JAAFAR ALI

v.

PP

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL J
[CRIMINAL APPEAL NO: 42-2-98]
4 SEPTEMBER 1998

EVIDENCE: *Identification parade - Witness identified accused earlier at police station - Value of identification at identification parade conducted later*

EVIDENCE: *Identification evidence - Dock identification - Absence of pre-trial description - Value of such dock identification*

EVIDENCE: *Standard of proof - Standard of proof at the end of the defence - Evidence to be evaluated at the end of the defence - Whether evidence properly evaluated at the end of defence - Criminal Procedure Code, s. 173(m)(1)*

EVIDENCE: *Corroboration - Identification evidence - Application of the Turnbull guidelines - Whether Turnbull guidelines applied in the proper manner - Whether warning administered was sufficient*

The accused was convicted under s. 307 of the Penal Code for the attempted murder of one Noor Junizah Mokhri (PW5) and was sentenced to 10 years' imprisonment by the Sessions Court. According to the facts, on 5 May 1997, PW5 met the accused and rode pillion on his motorcycle until they reached a rubber plantation. The accused stopped at the plantation, and after about 10 to 15 minutes, began to strangle her. As a result she was hospitalised for 25 days. On 12 July 1997, she went to the police station where she met Sjn Amat Kaslar (PW13) who showed her two persons in a room. She identified one of them (the accused) as the person who had allegedly strangled her. On 14 July 1997, she attended an identification parade conducted by Inspector Arikrishnan (PW16) at the police headquarters. She identified the accused. She also identified the accused in court.

The sessions judge found that the identification parade conducted by PW16 had been vitiated. However, when considering the accused person's alibi, he found that it was a complete fabrication. This led him to the conclusion that the prosecution had proved its case beyond a reasonable doubt.

The accused appealed and the issues for consideration were in relation to the (a) identification evidence and (b) that standard used by the sessions judge in the light of s. 173(m)(1) of the Criminal Procedure Code ('CPC').

Held:

[1] Where evidence of identification represents any significant part of the proof of guilt in an offence, the judge (in line with the guidelines set out in *R v. Turnbull*) must warn the jury of the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula – but it must be cogent and effective and must be appropriate to the circumstances of the particular case. The failure to warn of the dangers of identification evidence may lead to the ordering of new trials and the quashing of convictions.

[1a] In this case the quality of the identification by PW5 could not be said to good as described in *Turnbull*. This was because she had seen the accused for only about five to ten minutes and the fact that there were bruises around her eyes showed that she could not have observed the accused well at that time. Her evidence therefore was required to be supported.

[1b] The warning administered was general and not effective enough to reflect the requirements of the *Turnbull* guidelines. It referred to only one aspect – the need for caution before convicting. The sessions judge had not instructed himself on the reason for the need for such warning and had not made any reference to the possibility that a mistaken witness could be a convincing one and that a witness might be quite honest and still be mistaken. A warning of this nature will ensure that the evidence adduced is viewed in its proper perspective. The warning given by the sessions judge was therefore not sufficient.

[2] The absence of a pre-trial description of the accused will reduce the value of the identification in an identification parade and the subsequent identification in court. In this case, the identification parade conducted by PW16 had absolutely no weight as PW5 had seen the accused at an earlier occasion at the police station. The earlier identification amounted to a "confrontation" – where the accused was literally shown to PW5. The evidence obtained from such procedure had no value at all.

[2a] The only proper identification therefore would have been the dock identification. However, given the fact that there was no pre-trial description and that the quality of the identification made at the scene of the crime was not good, and considering the circumstances in which it was made, the dock identification was of no value also.

[3] What the court has to decide at the close of the prosecution's case is whether as a question of law on the evidence adduced, the accused could be lawfully convicted – that is to say with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. This must be distinguished from the question of fact for ultimate decision which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the court, as a tribunal of fact, that the accused is guilty as charged.

[3a] It follows that in calling upon the accused to enter his defence, the court must keep an open mind as to the accuracy of the prosecution evidence until the defence evidence has been tendered. However, at the close of the case for the defence and after submissions, that court must review the evidence adduced with regard to all the elements to be proved and then decide whether the prosecution has proved the case against the accused beyond reasonable doubt.

[3b] The only evidence that the sesions judge evaluated at the end of the whole case was the evidence relating to the defence of alibi. With regard to the elements to be proved by the prosecution, in particular the evidence relating to the identification of the accused, his evaluation was only at the end of the case for the prosecution to rule that a *prima facie* case had been made out. He did not evaluate the evidence at the end of the whole case in order to determine whether they had been proved beyond a reasonable doubt. There was therefore a failure to comply with the mandatory requirements of s. 173(m)(1) of the CPC and such defect was not curable.

[Conviction quashed.]

Cases referred to:

A Ragunathan v. PP [1982] 1 CLJ 25 ***(cit)***
Alexander v. The Queen [1979-1980] 145 CLR 395 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597; [1997] 1 CLJ 686 ***(refd)***
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 ***(refd)***
Chang Kim Siong v. PP [1968] MLJ 36 ***(refd)***
Chooi Kam Woh v. R [1954] MLJ 264 ***(cit)***
Dato Mokhtar bin Hashim v. PP [1983] 2 CLJ 10 ***(cit)***
Davies v. R [1937] 57 CLR 170 ***(cit)***
Dominican v. R [1992] 173 CLR 555 ***(refd)***
Finn v. R [1988] 34 A Crim R 425 ***(cit)***
Grbic v. Pitkethly [1992] 38 FCR 95 ***(cit)***
Harun Abdullah v. PP [1998] 3 CLJ 184 ***(cit)***
Haw Tua Tau v. PP [1981] 1 CLJ 123 ***(foll)***

Ho Yew Cheng v. R [1962] MLJ 437 ***(cit)***
Ishak Shaari v. PP [1997] 3 CLJ Supp 223 ***(cit)***
Kelleher v. R [1974] 131 CLR 534 ***(cit)***
Lai Ah Kam & Anor v. R [1939] MLJ 306 ***(cit)***
Mc Shane v. Northumbria Chief Constable [1980] 72 Cr App R 208 ***(cit)***
Mezzo v. R [1986] 4 WWR 577 ***(cit)***
Nembhard v. R [1981] 74 Cr App R 144 ***(refd)***
PP v. Amar Singh [1948-49] MLJ Supp 55 ***(cit)***
PP v. Hussain Sudin [1991] 3 CLJ 2568 ***(cit)***
Pavone v. PP [1984] 1 MLJ 77 ***(refd)***
R v. Atfield [1983] 25 Alta LR (2d) 97 ***(cit)***
R v. Breslin [1984] 80 Cr App R 226 ***(cit)***
R v. Browne & Angus [1951] 99 CCC 141 ***(cit)***
R v. Cape [1996] 1 Cr App R 191 ***(refd)***
R v. Cartwright [1914] 10 Cr App R 219 ***(refd)***
R v. Chapman [1911] 7 Cr App R 53 ***(cit)***
R v. Courtnell [1990] Crim LR 115 ***(refd)***
R v. De-Cressac [1985] 1 NSWLR 381 ***(cit)***
R v. Dickson [1983] 1 VR 227 ***(cit)***
R v. Hunjan [1978] 68 Cr App R 99 ***(cit)***
R v. Keane [1977] 65 Cr App R 247 ***(cit)***
R v. Long [1973] 57 Cr App R 871 ***(cit)***
R v. McDonald 101 CCC 78 ***(cit)***
R v. Power [1987] 67 Nfld & PEIR 272 ***(cit)***
R v. Preston [1961] VR 861 ***(cit)***
R v. Smith and Evans [1908] 1 Cr App R 203 ***(cit)***
R v. Turnbull [1976] 3 All ER 549 ***(foll)***
R v. Weeder [1980] 71 Cr App R 228 ***(cit)***
Rangapula & Anor v. PP [1981] 1 CLJ 129 ***(cit)***
Reid (Junior) v. R [1990] 1 AC 363 ***(cit)***
Sharret v. Gill [1993] 65 A Crim R 44 ***(cit)***
Surandran Rajaretnam v. PP [1998] 2 CLJ 207 ***(cit)***
Smith v. R [1990] 64 ALJR 588 ***(cit)***
ST Shinde v. State of Maharashtra AIR [1974] SC 791 ***(refd)***
Yau Heng Seng v. PP [1985] 2 MLJ 335 ***(cit)***

Legislation referred to:
Criminal Procedure Code, ss. 173(f), (h), (m)(1), 182(m)(2), 182A(2), 307(3)
Evidence Act 1950, s. 9
Penal Code, s. 307

Other sources referred to:
Criminal Evidence, Andrews & Hirst, 3rd edn, pp 321, 336, 338-339
Identification Evidence, Deutscher & Leonoff, pp 111-112

For the appellant - A Rengganathan; M/s A Rengganathan & Co
For the respondent - Anslem Charles Fernandis DPP

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

The accused was convicted under s. 307 of the Penal Code for the attempted murder of one Noor Junizah bte Mokhri (PW5) and sentenced to 10 years' imprisonment by the Sessions Court at Melaka. This appeal is by the accused against the conviction and sentence.

The Facts Of The Case

On 5 May 1997 at about 6.45pm. PW5, aged 11, went to a provision shop near her house to look for her sister. On arrival at the shop she saw a male person (the accused) seated on a red motor cycle. The colour of the motor cycle was confirmed by PW7 and PW9. PW5 said that the accused was wearing a black jacket and a crash helmet. She was not sure of the colour of his trousers. She started playing with her sister and friends. The accused then asked her to follow him to look for 20 cents that Nurul Suhana, one of the children she was playing with, had lost. She rode pillion on his motor cycle for about 15 minutes to a rubber plantation. The accused stopped at the side of the plantation near a road. PW5 alighted from the motor cycle. The accused then removed his crash helmet. He was about 10 feet away from her. She said that she could see his face clearly though it was a bit dark. He then showed her photographs of women in bikini. At that time he was about three feet away from her and she said that again she saw his face clearly. She noticed that his hair was short, he had some pimples on his face and he was thin. After about five to ten minutes he began to strangle her neck. At that time he was about one and a half feet away from her. She said that she could see his face clearly at that time also. She then became unconscious and regained consciousness in the morning at the same place. She heard the sound of a motor cycle but had no voice to call for help. Two persons, Osman and Marshad who were on the motor cycle, helped her. While Marshad stayed with her Osman went to call her mother. She was then taken to a clinic and later to the hospital. She was warded for 25 days. On 12 July 1997 she went to Tiang Dua Police Station where she met Sjn. Amat Kaslar (PW13). He showed her two persons who were in a room. She identified the accused as the person who strangled her. On 14 July 1997 she attended an identification parade conducted by Inspector Arikrishnan (PW16) at the Melaka Police Headquarters. There were about 10 persons in the parade. She identified the accused. In cross-examination she said that she had not seen the accused prior to the incident. She was shown a photograph of the accused in her house by the police. It was shown to her after the identification parade in order to enable her to identify the accused correctly. She also added that she could identify the accused even without the photograph. She identified the accused in court.

Dr. Loke Tien Hsi (PW8) examined PW5 in the hospital on 6 May 1997. He said that she had bruises around both her eyes, a 2cm laceration underneath the left jaw, bruises around the neck area and abrasions on her left shoulder. She was very upset and weak and was crying. But she was able to describe what happened to her. Inspector Hadi bin Osman (PW18), the investigation officer, said that he visited PW5 in hospital on 14 May 1997. He asked her for a description of the person who had attacked her. At that time she was still frightened and did not give him any description. He added that till to date she had not given him any description of the person. PW13 said that he arrested the accused on 12 July 1997 and took PW5 to the Police Station at Tiang Dua to identify the accused. The accused was in a room with a policeman. PW13 asked her whether she could identify the thin man in the room. She said that she could identify him as the accused. PW16 said that he conducted the identification parade on 14 July 1997 at the Melaka Police Headquarters. He used 10 persons in the parade. All were male Malays aged 20 except for one who was aged 19. All of them were of the same build as the accused and wore similar clothes. The accused was placed in the 8th position. He did not object. When the participants were ready PW16 asked for PW5 to be brought in. As she was frightened she was asked to see the participants through a one-way mirror. She identified the accused through the mirror without any difficulty.

The Grounds Of Judgment

The grounds of judgment of the learned Sessions Court judge is in three parts. The first part containing the reasons for holding that there is a *prima facie* case is part of the notes of evidence. The second part with the heading "Alasan Penghakiman" deals with the defence of the accused. The third part, dealing with the reasons for the imposition of the sentence, is also part of the notes of evidence. I shall comment on this method of preparing the grounds of judgment in a later part of the judgment.

In the first part of the judgment the learned Sessions Court judge said that the issue of identification of the accused was of prime importance in this case. He referred to the guidelines laid down in the celebrated case of *R v. Turnbull* [1976] 3 All ER 549. In assessing the quality of the identification evidence he narrated the sequence of events that took place till the time of the strangulation and said:

> The victim had the accused under observation for at least 30 minutes.

He said that PW5 had a clear look at the face and physique of the accused. Although it was getting dark the light was sufficient for her to look at the features of the accused. He referred to the removal of the crash helmet by the accused to show that PW5's observation was not impeded. He then posed this question:

> Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by her and his actual appearance?

And answered it this way:

> The investigation officer stated that he visited the victim in hospital on 14.5.97 and attempted to get a description of the assailant from her. But she was too frightened to give him any description.

He then proceeded to say:

> In conclusion, in assessing the quality of identification evidence, I have warned myself of the special need for caution. As stated above, this is not a case where the victim had a brief fleeting view of the side of the accused's face at night, as was the case in *Turnbull* – see page 556. This is a case, where the victim had a good look at the face of the accused, at very close quarters in sufficient light.
>
> The fact that the victim did not give a description of her attacker to the police did not mean that she could not remember the face of the attacker. How could she forget. Her mind would have been playing back the vicious attack repeatedly. She could not give any description of the attacker, when the investigating officer visited her some 9 days, after the attack, as she was suffering from trauma from day one of admission, as confirmed by the medical evidence. The point is she had ample opportunity to mark the face and features of the accused. It is quite natural that her impression had become quite vividly sketched on her mind and was able to identify the accused subsequently ...
>
> Hence, for the reasons given above, I find that the quality of the identification evidence given by the victim is good at the end of the case for the prosecution and as such the need for other supporting evidence does not arise.

He then said:

> It is trite law that where the victim did not know the accused before the incident it is incumbent that an identification parade is held. The object of an identification parade is to make sure that the ability of the witness to recognise the suspect has been fairly and adequately tested. In this regard the witness should be prevented from seeing the suspect before he is paraded with other persons. See *Sarkar on Evidence* 14th Edition 1993 page 181.

Thus, he said, the identification conducted by PW13 had "... now prejudiced the investigation of the case." He said that this had vitiated the identification parade conducted by PW16 on 12 July 1997. He said that dock identification done for the first time in court is inherently weak. In the second part of his judgment he considered the defence of alibi advanced by the accused and said that it is completely false and fabricated. In the concluding part of his judgment he said:

> As stated at the outset that the burden of proof as to the guilt of the accused always remains on the prosecution. In this regard the new s. 182A(iii) of the Criminal Procedure Code states *inter alia:*
>
> (ii) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted thereon.

In accordance with the legal principles stated above, it is the finding of this court that the prosecution has proved its case beyond reasonable doubt and the accused is found guilty on the offence as charged and is convicted thereon.

The Grounds Of Appeal

In his submission learned counsel for the accused said that his grounds of appeal will be confined to the following two issues:

(a) Evidence of identification; and

(b) Non-compliance with s. 173(m)(1) of the Criminal Procedure Code.

I shall consider both the issues separately.

(a) Evidence Of Identification

The Submissions Of The Parties

Learned counsel for the accused said that the accused was not known to PW5 prior to the incident. He said that PW5 did not give any description of the accused to the police or any other person. He added that the subsequent identification conducted by the police was irregular and though the learned Sessions Court judge had correctly rejected all such evidence he still proceeded to convict the accused. This finding, he contended, is wrong in law as it is against the principles laid down in *Turnbull*. In his reply the learned Deputy Public Prosecutor conceded that the identification parade which was held was defective as the accused had been shown to PW5 prior to the holding of the parade. He said that the learned Sessions Court judge had followed the guidelines laid down in *Turnbull* correctly and had given himself the required caution. In such circumstances, he said, the failure to hold a proper identification is not fatal.

The Law

Pre-trial identification of suspected offenders are complemented by judicial guidelines concerning the appraisal of identification evidence at the trial itself (see *Criminal Evidence* 3rd Edn by Andrews & Hirst at p. 336). These guidelines were enunciated by the Court of Appeal in *Turnbull* as a result of criticism of the existing law under which no specific duty was imposed on judges to warn juries against the proven dangers of mistaken identification evidence (see *R v. Long* [1973] 57 Cr App R 871). The *Turnbull* guidelines have been accepted in Canada (see *Mezzo v. R* [1986] 4 WWR 577); in Australia (see *Kelleher v. R* [1974] 131 CLR 534); and in Malaysia (see *Rangapula and Anor v. PP* [1981] 1 CLJ 129; [1982] 1 MLJ 91; *Mokhtar bin Hashim v. PP* [1983] 2 CLJ 10; [1983] 2 MLJ 232; *Yau Heng Seng v. PP* [1985] 2 MLJ 335; *Arumugam s/o Muthusamy v. PP* [1998] 3 CLJ 597; [1998] 3 MLJ 73). These guidelines which appear in the judgment of Lord Widgery CJ in *Turnbull* deal with four issues. In elaborating on these issues I can do no better than reproduce the work of Andrews & Hirst

from pp. 338-339 where the learned authors have admirably re-arranged certain paragraphs of the judgment to explain them. They are as follows:

(a) The need for the judge to warn the jury about the dangers of identification evidence

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence allege to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance upon the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning, and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made, (at pp. 551-552).

(b) The need for him to direct the jury to examine various specific matters that may affect the strength or cogency of the evidence before them

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such description, the prosecution should supply them. Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger, (at p. 552).

(c) The question of when a jury may properly be allowed by the judge to convict the accused even in the absence of other evidence supporting the crucial identification;

In our judgment, when the quality [of identification] is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence, even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur ...

When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification, (at pp. 552, 553).

(d) The question of what other evidence may properly be regarded as capable of supporting an identification

This [supporting evidence] may be corroboration in the sense lawyers use the word, but it need not be so if its effect is to make the jury sure that there has been no mistake in the identification. For example, X sees the accused: he gets only a fleeting glance of the thief's face as he runs off, but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury: but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in *R v. Long* [1973] 57 Cr App Rep. 871. The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions, but each had only a momentary opportunity for observation. Immediately after the robbery, the accused had left his home and could not be found by the police. When later he was seen by them, he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment, odd coincidences can, if unexplained, be supporting evidence.

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything, and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence, they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.

> Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on, may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only where the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was. (at 553-554).

A brief comment on the *Turnbull* guidelines may be of relevance. In *R v. Keane* [1977] 65 Cr App R 247 it was held that there was flexibility in the application of the guidelines. This was repeated by the Privy Council in *Nembhard v. R* [1981] 74 Cr App R 144 in the following words:

> *Turnbull* does not purport to change the law. It provides a most valuable analysis of the various circumstances which common sense suggests or experience has shown may affect the reliability of a witness's evidence of identification and make it too dangerous in some of the circumstances postulated to base a conviction on such evidence unless it is supported by other evidence that points to the defendant's guilt. *Turnbull* sets out what the judgment itself described as 'guidelines for trial judges' who are obliged to direct juries in such cases. But those guidelines are not intended as an elaborate specification to be adopted religiously on every occasion. A summing up, if it is to be helpful to the jury should be tailored to fit the facts of the particular case and not merely taken ready-made 'off the peg'.

However, it has been emphasised that where the primary issue is the identity of the accused the principles set out in *Turnbull* must be followed (see *Mc Shane v. Northumbria Chief Constable* [1980] 72 Cr App R 208; *R v. Hunjan* [1978] 68 Cr App R 99; *R v. Weeder* [1980] 71 Cr App R 228; *R v. Breslin* [1984] 80 Cr App R 226). They apply to non-jury as well as jury trials (see *Grbic v. Pitkethly* [1992] 38 FCR 95; *Sharret v. Gill* [1993] 65 A Crim R 44; *Arumugam s/o Muthusamy v. PP* [1998] 3 CLJ 597; [1998] 3 MLJ 73). Thus they would apply in this case. Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed (see *Dominican v. R* [1992] 173 CLR 555). The terms of the warning need not follow any particular formula (see *R v. De-Cressac* [1985] 1 NSWLR 381; *Finn v. R* [1988] 34 A Crim R 425). But it must be cogent and effective (see *R v. Dickson* [1983] 1 VR 227; *Reid (Junior) v. R* [1990] 1 AC 363). A warning in general terms is not sufficient (*Kelleher v. R* [1974] 131 CLR 534). The warning must be appropriate to the circumstances of the particular case (see *Smith v. R* [1990] 64 ALJR 588). Failure to warn of the dangers of identity evidence may lead to the ordering of new trials or the quashing of convictions (see *R v. Preston* [1961] VR 861; *Dominican v. R*

[1992] 173 CLR 555; *R v. Keane* [1977] 65 Cr App R 247). On the sort of warning that must be given useful reference may be made to *Dominican v. R* [1992] 173 CLR 555 where the majority said at p. 565:

> The adequacy of a warning in an identification case must be evaluated in the context of the evidence in the case. But its adequacy is evaluated by reference to the identification evidence and not the other evidence in the case. The adequacy of the warning has to be evaluated by reference to the nature of the relationship between the witness and the person identified, the opportunity to observe the person subsequently identified, the length of time between the incident and the identification, and the nature and circumstances of the first identification – not by reference to other evidence which implicates the accused. A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused. The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence.

The quality of the identification evidence that is required includes a description of the accused that the identifying witness must have given to the police. The need for such description is implicit in *Turnbull* itself and has been stressed in cases such as *R v. Atfield* [1983] 25 Alta LR (2d) 97; *R v. Power* [1987] 67 Nfld & PEIR 272 and *PP v. Amar Singh* [1948-49] MLJ Supp 55. In my opinion it is necessary for an identifying witness to give a description of the accused especially in cases where the accused was not known to the witness prior to the incident. It may not be necessary where there is other supporting evidence on the identification of the accused and when the accused is well known to the witness. The object of a description of the accused is explained by Deutscher and Leonoff in their book entitled *Identification Evidence* in the following words at pp. 111-112:

> This preserves the original memory in as accurate a form as possible. The original description can then be cross-checked with the description given by other witnesses, with the actual appearance of the accused, and with the description given at trial. Variations between the original description and that given at trial may be as a result of the numerous psychological factors that tend to distort memory over time.

When the quality of the identification evidence is good as described in *Turnbull* it is sufficient eventhough there is no other evidence to support it provided that an adequate warning is given. When the quality is poor, as for example it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the accused shall be acquitted unless there is other evidence to support the correctness of the identification (see *R v. McDonald* 101 CCC 78). In the absence of such other evidence the fact that the accused was picked out at an identification parade makes no difference to the order to be made.

There have been many cases of wrongful convictions based on mistaken eyewitness identification. It has been held that evidence as to identity based on personal impressions, however *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict (see *R v. McDonald* 101 CCC 78). Thus it has long been recognised that witnesses should be asked to identify a suspect or an accused at the earliest opportunity and under the fairest of circumstances (see *R v. Cartwright* [1914] 10 Cr App R 219; *Davies v. R* [1937] 57 CLR 170; *R v. Browne and Angus* [1951] 99 CCC 141). Evidence given by a witness identifying an accused as the person whom he saw at the scene of the crime or in circumstances connected with the crime will generally be of very little value if the witness has not seen the accused since the events in question and is asked to identify him for the first time in the dock, at least when the witness has not, by reason of previous knowledge or association, become familiar with the appearance of the accused. Gibbs CJ, having said that in *Alexander v. The Queen* [1979-1980] 145 CLR 395 added at p. 400:

> However, as a matter of legal principle, it seems to me impossible to say that the admissibility of evidence of a prior act of identification depends on the fact that an identification parade was held.

Chong Siew Fai CJ (Sabah & Sarawak) in speaking for the Federal Court in *Arumugam s/o Muthusamy v. PP* [1998] 3 MLJ 73 said at p. 75:

> Generally speaking, however, a dock identification in the sense as described above, ie, identification of an accused for the first time in court at the trial is undesirable, and it would be a good practice to hold an identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too strict. There may well be situations where an identification parade cannot or need not be held, for example, where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances.

On the instances when an identification parade is required Andrews & Hirst say this at p. 321:

> It is necessary to distinguish between cases in which the accuracy of a purported identification is in issue, and cases in which the only issue is whether identifying witnesses are lying. In the former kind of case, much will turn upon the reliability or pre-trial identification, and a failure to follow proper procedures in respect of such identification may well lead to the court or judge excluding the evidence concerning it. It will also be essential, in most cases, for the judge to direct the jury on the dangers of mistaken identification, in accordance with the procedures prescribed by the Court of Appeal in *R v. Turnbull* [1976] 3 All ER 549.
>
> Where, in contrast, the veracity of the witness is the only issue, it will not generally be either necessary or appropriate for the identification parade to be held or for a *Turnbull* direction to be given.

Thus, in *R v. Courtnell* [1990] Crim LR 115 the appellant was identified by a publican as the man who had robbed him of his takings. There was no identification parade; at a confrontation the publican claimed to recognise him as a regular customer over the previous week; the appellant alleged in reply that he was being "stitched up", and subsequently ran a defence alleging that the case against him was a total fabrication. He was convicted, and appealed on the ground that no *Turnbull* direction had been given at the trial, but the Court of Appeal held that none was required. In *R v. Cape* [1996] 1 Cr App R 191 it was held that in a case where the witness knew the accused well and the latter's sole defence was one of malicious fabrication by the witness no useful purpose could have been served by the giving of a *Turnbull* warning. When the accused is caught red-handed there is no need for an identification parade (see *Ho Yew Cheng v. R* [1962] MLJ 437). The evidence of identification parade is admissible under s. 9 of the Evidence Act 1950 (see *ST Shinde v. State of Maharashtra* AIR [1974] SC 791).

The Findings Of The Court

On the relevant facts of this case, to which I shall refer shortly, it cannot be said that the identification of the accused by PW5 was good within the meaning of *Turnbull.* Her evidence therefore requires to be supported. It is necessary to comply with the *Turnbull* guidelines as the primary issue involved is the identity of the accused which depends on the accuracy of the evidence of PW5. This warrants a consideration of the extent to which the learned Sessions Court judge has applied the guidelines. With regard to the required warning he merely said:

> In conclusion, in assessing the quality of identification evidence, I have warned myself of the special need for caution. As stated above, this is not a case where the victim had a brief fleeting view of the side of the accuseds' face at night, as was the case is *Turnbull* – see p. 556. This is a case, where the victim had a good hard look at the face of the accused, at very close quarters in sufficient light.

The warning is general in nature and is not effective enough to reflect the requirements of the *Turnbull* guidelines. It refers to only one aspect of the warning that the learned Sessions Court judge has to give himself, that is to say, the need for caution before convicting the accused in reliance upon the correctness of the identification. He has not instructed himself on the reason for the need for such warning and has not made any reference to the possibility that a mistaken witness can be a convincing one and that a witness may be quite honest and still be mistaken. A warning of this nature will ensure that the evidence adduced is viewed in its proper perspective. It is therefore my view that the warning given by the learned Sessions Court judge is not sufficient.

A further defect in the identification evidence is that the police did not get a description of the accused from PW5 prior to his dock identification. On this issue the learned Sessions Court judge said:

> The fact that the victim did not give a description of her attacker to the police did not mean that she could not remember the face of the attacker. How could she forget. Her mind would have been playing back the viscous *(sic)* attack repeatedly.
>
> … The point is she had ample opportunity to mark the face and features of the accused. It is quite natural that her impression had become quite vividly sketched on her mind and was able to identify the accused subsequently.

This finding is not based on the evidence adduced but on mere speculation. In any event the view expressed by the learned Sessions Court judge overlooks the fundamental object of obtaining a description of the accused from the witness which is to cross-check the subsequent identification of the accused with the description. This will assist in eliminating an objection based on mistaken identification. The absence of a pre-trial description of the accused will reduce the value of identification in an identification parade and subsequent identification in court. There can be no dispute that a description given will enhance the value of such evidence. It is my view that the learned Sessions Court judge has discounted the lack of description of the accused by PW5 on wrong principles. In my opinion the absence of such description is prejudicial to the prosecution on the facts of this case as the accused was not known to PW5 prior to the incident. I interpolate to add that the description of the accused given by PW5 at the trial has no value.

The identification parade conducted by PW16 has absolutely no weight as PW5 had seen the accused at an earlier occasion in the police station. On the vitiating effect of identification parade evidence where the witness had the opportunity to see the accused at an earlier occasion, see cases such as *Chang Kim Siong v. PP* [1968] MLJ 36; *Lai Ah Kam & Anor v. R* [1939] MLJ 306 and *Chooi Kam Woh v. R* [1954] MLJ 264. The earlier identification amounts to what is referred to as a "confrontation". It refers to any situation where an accused is singled out to a witness as in this case where the accused was literally shown to PW5. The evidence obtained from such a procedure has no value (see *R v. Smith and Evans* [1908] 1 Cr App R 203; *R v. Chapman* [1911] 7 Cr App R 53; *R v. Keane* [1977] 65 Cr App 247). Even the assessment of the identification evidence of PW5 by the learned Sessions Court judge is defective. He made an attempt to analyse her evidence in some detail. However, his finding that PW5 had the accused "... under observation for at least 30 minutes" weakens his analysis. In her own testimony PW5 said that she saw the accused's face for only about five to ten minutes. Prior to that she was riding pillion on his motor cycle. Subsequent to that she was undergoing the trauma of being strangled. To say therefore that she had the accused "under observation" for the whole period she was with him shows a misappreciation of the facts of the case.

Thus the only proper identification that PW5 made of the accused was when he was in the dock. This method of identification would have value only if the quality of the identification of the accused by PW5 at the time of the commission of the offence was good. PW5 saw the accused only for about five to ten minutes. During that time she was shown pictures of women in bikini followed by the attempt to strangulate her. The fact that there were bruises around her eyes shows that PW5 could not have observed the accused well at that time. It cannot therefore be said that PW5 had the accused "under observation" even for the full period that the accused had removed his crash helmet. The quality of her identification evidence of the accused cannot therefore be said to be good as described in *Turnbull*. It thus requires supporting evidence. However, with regard to the required evidence in support she failed to give any description of the accused to the police soon after the incident. Neither was the identification parade conducted of any value as PW5 had seen the accused prior to that. Thus the dock identification of the accused conducted in such circumstances has no value. Accordingly there was no evidence on the identification of the accused.

(b) Non-compliance with Section 173(m)(1) of the Criminal Procedure Code

The submissions of the parties

Learned counsel for the accused said that the learned Sessions Court judge did not refer to the prosecution evidence at the end of the case for the defence. He referred to the second part of the grounds of judgment where the learned Sessions Court judge said at p. 85 of the appeal record:

> I have already given my reasons for calling the defence of the accused. Now, I will proceed to consider the defence put forth.

He also cited the learned Sessions Court judges' reference to s. 182A(2) of the Criminal Procedure Code ("the Code") which is applicable to trials in the High Court and his mere finding that the prosecution had proved its case beyond reasonable doubt. In his reply the learned Deputy Public Prosecutor, acknowledging that the learned Sessions Court judge's reference to s. 182(m)(2) of the Code was wrong, said that it is not necessary to expressly state that s. 173(m)(1) of the Code has been complied with. He added that a reading of the judgment as a whole indicates that the learned Sessions Court judge has considered the prosecution case in the light of the case for the defence.

The Law

This issue requires a consideration of the duty of the court in assessing the evidence adduced at the close of the case for the prosecution and at the end of the whole case. This brings into focus ss. 173(f), (h) and (m) of the Code which read as follows:

Section 173(f)

(1) When the case for the prosecution is concluded the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.

Section 173(h)

(1) If the court finds that a *prima facie* case has been made out against the accused on the offence charged, the court shall call upon the accused to enter on his defence.

Section 173 (m)

(1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted thereon and the court shall pass sentence according to law.

(3) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

The duty of the court at the end of the case for the prosecution and at the end of the whole case is, as envisaged in the sections that I have referred to, explained in *Haw Tua Tau v. PP* [1981] 2 MLJ 49 at pp. 51-52. The duty is neatly summarised by Edgar Joseph Jr FCJ in *Arulpragasan a/l Sandaraju v. PP* [1997] 1 MLJ at pp. 40-41 in the following terms:

> The starting point for the discussion as to what is required to establish a '*prima facie* case' is the Australian case of *May v. O' Sullivan* [1955] 92 CLR 654, where the Full High Court (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ) said, *inter alia,* this (at pp. 657-658):
>
> > When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant *ought* to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted. This is really a question of law … After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact …. A magistrate who has decided that there is a 'case to answer' may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made 'a *prima facie* case', but it does not follow that in the absence of a 'satisfactory answer' the defendant should be convicted …

The second case is *Considine v. Lemmer* [1971] SASR 39, where Bright J, correctly paraphrasing *May v. O' Sullivan* said this (at p. 51):

> I agree that a *prima facie* case, uncontradicted by credible evidence, does not lead automatically to conviction. For the *prima facie* case may do not more than tend to prove guilt: it may contain weaknesses which inspire doubt. To say this is to do no more than paraphrase *May v. O'Sullivan*.

The third case is *Zanetti v. Hill* [1962] 108 CLR 433 at p. 442 where Kitto J expounded the issue at hand, by stating:

> … that is to say, there is with respect to every element of the offence some evidence which, *if accepted*, would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact for ultimate decision, namely whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt.

Thus what the court has to decide at the close of the case for the prosecution is to determine as a question of law whether on the evidence adduced the accused could lawfully be convicted, that is to say, whether there is with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the court, as a tribunal of fact, that the accused is guilty as charged (see *A Ragunathan v. PP* [1982] 1 CLJ 25; [1982] 1 MLJ 139). It follows that in calling upon the accused to enter his defence the court must keep an open mind as to the accuracy of the prosecution evidence until the defence evidence has been tendered. At the close of the case for the defence and submissions the court must review the evidence adduced with regard to all the elements to be proved and then decide whether the prosecution has proved the case against the accused beyond reasonable doubt. As Edgar Joseph Jr J (as he then was) said in *Pavone v. PP* [1984] 1 MLJ 77 at pp. 78-79:

> It is implicit in the observation that the learned President had determined the issue of the veracity and accuracy of recollection of the witnesses for the prosecution before she called upon the defence. This was clearly wrong as it amounted to a provisional verdict of guilty thus raising the question whether the appellant was deprived of the substance of a fair trial, a matter of the first importance in the administration of criminal justice in any country following a Common Law system. Now, the sole question at the close of the case for the prosecution is whether or not a *prima facie* case has been made out, that is to say, whether there is some evidence (not inherently incredible) which, if believed, establishes the essential elements of the offence charged. If there is such evidence, then the defence must be called but care must be taken to leave suspended the question of the veracity

and accuracy of recollection of witnesses until after the close of the case for the defence. This applies even where, as here, the defence elects to remain silent and calls no evidence. Consequently, in a proper case, there is nothing illegal in a Magistrate or a President, or a judge sitting alone or with assessors, calling for the defence upon *prima facie* evidence being adduced and then proceeding to acquit and discharge even when the accused elects to remain silent and to call no evidence if not satisfied that the charge has been established by the prosecution beyond all reasonable doubt.

Failure to comply with these mandatory requirements would amount to a misdirection on the burden of proof which is not curable (see *Ishak Shaari v. PP* [1997] 3 CLJ Supp 223; *Surandran a/l Rajaretnam v. PP* [1998] 2 CLJ 207; [1998] 2 MLJ 49; *Harun bin Abdullah v. PP* [1998] 3 CLJ 184; [1998] 3 MLJ 1).

Finding Of The Court

The only evidence that the learned Sessions Court judge evaluated at the end of the whole case was the evidence relating to the defence of alibi. With regard to the elements to be proved by the prosecution, in particular, the evidence relating to the identification of the accused, the evaluation done by him was only at the end of the case for the prosecution to rule that a *prima facie* had been made out. He did not evaluate them at the end of the whole case in order to determine whether they had been proved beyond reasonable doubt. His mere finding at the end of the case for the defence that the prosecution has proved its case beyond reasonable doubt is, in my opinion, insufficient to show that there has been an evaluation on the accuracy and veracity of the evidence as required. He has therefore failed to comply with the mandatory requirements of the Code with regard to the burden of proof on the prosecution. This defect is not curable.

It is my view that the learned Sessions Court judge fell into this error by having his grounds of judgment in three parts. Quite apart from contributing to the error made by him it is also wrong in law to have grounds of judgment written in that manner. All three parts of the judgment ought to have been combined to form the grounds of judgment instead of leaving some parts in the notes of evidence. An appellant is entitled to a signed copy of the grounds of decision in accordance with s. 307(3) of the Code. This, to my mind, refers to the entire grounds and not merely to a part. This is necessary to enable the appellant to file his petition of appeal within the prescribed time. He would be unable to do so if certain parts of the judgment are contained in the notes of evidence for which he had not applied and, as a result, not supplied to him.

In the light of the views that I have expressed the conviction and sentence of the accused cannot be sustained. Accordingly, I quash the conviction and sentence imposed on him and order that he be acquitted and discharged.